LIBRARY
SUPREME COURT, U. S.

No. 892

Office - Supreme Court, U.S.
FILED
APR 3 1958
JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

October Term, 1957

---

GUNNLEIK BERGE,

*Petitioner,*

AGAINST

NATIONAL BULK CARRIERS, INC.
and TODD SHIPYARDS CORP.,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

FRANK REISS,
*Attorney for Petitioner,*
20 Vesey Street,
New York City.

JACK STEINMAN,
HARRY H. LIPSIG,
*on Petition.*

# INDEX


| | PAGE |
|---|---|
| Citations to Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 6 |
| Conclusion | 10 |


## INDEX TO APPENDIX


| | |
|---|---|
| Opinion of United States Court of Appeals for the Second Circuit | 13 |
| Opinion of United States District Court for the Southern District of New York | 16 |
| Opinion of United States Court of Appeals for the Second Circuit—Halecki Case | 23 |
| Judgment | 41 |


## CASES CITED


| | |
|---|---|
| Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52 | 7 |
| Berryhill v. Pacific Far East Line, 238 Fed. (2) 385 (9th Circuit), cert. den., 354 U. S. 938 | 6 |

PAGE

Caudill v. Victory Carriers, 149 Fed. Supp. 11 .... 9

Halecki v. United New York and New Jersey Sandy Hook Pilots Association (not yet officially reported) ..... 5, 6

Imperial Oil Ltd. v. Drlik, 234 Fed. (2) 4 ..... 9

Lester v. U. S. A., 127 Fed. Supp. 413, 234 Fed. (2) 625 (2nd Cir.—1956) ..... 10

Meyers v. Pittsburgh S. S. Co., 165 Fed. (2) 642 (6th Cir.) (1948) ..... 9

Pope & Talbot, Inc. v. Hawn, 346 U. S. 406 .....7, 8, 10

Read v. U. S., 201 Fed. (2) 758 (3rd Circuit) ..... 6, 8

Ross v. Zealand, 143 Fed. Supp. 656 ..... 8

Seas Shipping Co. v. Sieracki, 328 U. S. 85 .....2, 5, 7, 8

## AUTHORITY CITED

"The Law of Admiralty", Black and Gilmore, published 1957—page 364 ..... 10

# Supreme Court of the United States

OCTOBER TERM 1957

---

GUNNLEIK BERGE,

*Petitioner,*

AGAINST

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORP.,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Gunnleik Berge, prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed January 10, 1958 affirming a final judgment entered in the United States District Court for the Southern District of New York on February 25, 1957 on the opinion of Murphy, J., dismissing the complaint.

### Citations to Opinions Below

The opinion of the Court of Appeals for the Second Circuit, which appears on pages 10a through 12a of the record herein, which is made a part of the Appendix to

this petition and printed *infra* at page 13, is not yet officially reported.

The opinion of the District Court, by Murphy, J., deciding various factual issues by agreement of the parties, and then dismissing the complaint, after damages had been assessed by the jury in the amount of $100,000 is reported in 148 Fed. Supp. 608. The opinion appears on pages 4a through 9a of the record herein and is made a part of the Appendix to this petition, and printed *infra* at page 16.

## Jurisdiction

The jurisdiction of this Court is invoked pursuant to the Provisions of Title 28 U. S. C. A. Section 1254 (1). The judgment of the Court of Appeals affirming the judgment dismissing the complaint, was entered January 10, 1958, the appeal having been argued on November 22, 1957.

## Questions Presented

Whether a ship rigger, a business invitee, performing repair services aboard a vessel in navigable waters, who is injured as the result of the unseaworthiness of the vessel, is entitled to recover damages for such injury by invoking the warranty of seaworthiness?

Which classes or types of business invitees aboard vessels, other than seamen and longshoremen, are entitled to the benefits of the warranty of seaworthiness?

Does the opinion of the Court below improperly limit the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and authorities following it, in that it excludes a rigger-repairman from the class of persons entitled to the warranty of seaworthiness?

## Statement of the Case

The basis of federal jurisdiction in the District Court is diversity of citizenship between the parties and the required amount in controversy.

At the outset, we point out that the opinion of the District Court explicitly states that most of the facts herein are undisputed (R. 5a, p. 17, *infra*). No questions of fact are raised by the Court of Appeals for the Second Circuit.

The accident herein occurred on October 31, 1952. The vessel, the *SS. "Bulklube"* was in navigable waters at Todd Shipyards in Brooklyn, New York. The shipyard was performing "* * * rather extensive repairs, * * *" (R. 5a, p. 17, *infra*) to the vessel.

Petitioner's specific task on the vessel when injured was the adjustment of a bulkhead into position by means of a manually operated chain-fall and hoist. The equipment being used was owned by the shipyard and had been rigged and secured by petitioner's fellow employees prior to the time petitioner was working with it.

The chain-fall was secured at its highest point to a shackle and the shackle was passed through a padeye, the latter in turn being welded to the underside of the deck below which the bulkhead was to be located.

While petitioner was pulling on the chain-fall, the shackle pin broke, the heavy chain fell, throwing him a distance of some 12 or 15 feet to the deck below, where the chain then landed upon him as he lay. As a result of the occurrence, petitioner sustained serious and permanent injuries.

After the trial, but before the case was submitted to the jury, by agreement of all parties, the case was given to

the jury solely to determine the issue of damages; by the same agreement, the District Court reserved to itself the determination of three factual issues; first whether or not shipowner retained control over the vessel, second, whether or not the shackle pin was defective (i.e., unseaworthy) and third, whether or not, if the pin was defective, this was the proximate cause of the accident.

The jury returned a verdict of $100,000. Motions were thereupon made by both respondents to set the verdict aside as being excessive.

The District Court in resolving the three factual issues reserved to it, decided that the shipowner was not in control of the vessel, at the time of the accident, but recognized that "The issue of control is no longer of much importance since the decision of *Petterson* v. *Alaska SS. Co.*, 205 Fed. (2) 478, (9th Cir. 1953), aff'd. 347 U. S. 396 (1954)" (R. 7a. p. 19, *infra*.)

The District Court further found that the shackle was defective and that this defect was the proximate cause of the accident (R. 7a, p. 19, *infra*).

The District Court recognized and stated that petitioner was entitled to a verdict if he could avail himself of the warranty of seaworthiness (R. 7a, p. 19, *infra*). However, the Court declined and refused to apply the seaworthiness doctrine to petitioner and dismissed the complaint.

In view of this disposition of the issue of liability, the District Court did not reach the question of the excessiveness of the verdict nor the question of indemnity between shipowner and shipyard.

The Court of Appeals for the Second Circuit wrote a brief opinion herein, handed down simultaneously with its opinion in *Halecki* v. *United New York and New*

*Jersey Sandy Hook Pilots Association.* (Not yet officially reported; the opinion is made a part of the appendix to this petition and is printed *infra* at p. 23.)

The opinion of the Court below in the case at bar stated the issue as follows: "Thus the question is whether the situation was within the doctrine of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, and those decisions that have followed it" (R. 12a, p. 15, *infra*).

The Court below, on the sole basis that the petitioner, a rigger-repairman employed by a shipyard and performing repair work on a vessel in navigable waters, was not engaged in the kind of work that the crew of a vessel was accustomed to perform, concluded that the petitioner was not entitled to a warranty of seaworthiness.

The Court below looked to the case of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 and those decisions that have followed it, but failed to apply the doctrine which these authorities pronounce.

Without discussing or even mentioning whether the issue is decided as a matter of law or as a matter of fact, historically or otherwise, the opinion below simply concludes that petitioner was not doing work of a kind the crew was accustomed to perform. The opinion further concludes that, therefore, the petitioner is denied the protection of the warranty of seaworthiness.

In its opinion, by Hand, Circuit Judge, the Court below referred to the *Halecki* case, *supra*. However, in the *Halecki* case, decided by the same Court on the same day, the Court held that a ship-cleaner was entitled to a warranty of seaworthiness. Furthermore, the Court recognized that the element of "control" was not relevant in deciding this issue and also recognized that the fact that the gear which rendered the vessel unseaworthy was not

the ship's but was brought aboard, was likewise of no consequence (App., p. 27, 28, *infra*).

Lumbard, Circuit Judge, concurred in the result in the case at bar. In the *Halecki* case, *supra*, the same judge dissented and said that Berge's work was more the kind of work that the crew of a vessel was accustomed to do than was the work of Halecki (App., p. 38, *infra*).

Indeed, Judge Lumbard suggests that the test used by the Court below to decide whether or not a shipboard worker is entitled to a warranty of seaworthiness, is unsatisfactory.

Moreover, the majority opinion in the *Halecki* case (App., p. 27, *infra*), refers to other law in this area wherein it frankly admits the Court of Appeals for the Second Circuit was wrong. The Halecki opinion goes on to refer to cases where "inconsistent results" were obtained, such for example as *Read* v. *U. S.*, 201 Fed. (2) 758 (3rd Circuit) and *Berryhill* v. *Pacific Far East Line*, 238 Fed. (2) 385 (9th Circuit), cert. den., 354 U. S. 938.

We point out that these inconsistencies exist in different circuits, not to mention here others referred to below which are irreconcilable with decisions of this Honorable Court.

## Reasons for Granting the Writ

1. The question presented is important as affecting the rights and liabilities of many people in a far-flung industry which is affected with public interest.

2. The decision below narrows and constricts applicable decisions of this Honorable Court and is probably in conflict with them.

3. The decision below conflicts with decisions in Courts of Appeal of other Circuits and with District Court decisions; and is inconsistent with an earlier decision in the same Circuit.

4. Uniformity is required and necessitates a controlling decision by this Honorable Court.

5. The decision of the Court below is erroneous.

Since the shipping industry is undoubtedly one of the most important industries in this country, as it has always been, and directly involves many people as well as domestic and foreign economic and other factors, it is clearly in the public interest that the rights and liabilities of persons engaged in activities with the shipping business should be fixed and determined.

This Honorable Court has itself often recognized the importance of adjusting relations in this field.

Moreover, since it has been established at least since the decision in *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, if not earlier in *Atlantic Transport Co. of West Virginia* v. *Imbrovek*, 234 U. S. 52, that Federal maritime law governs in situations such as the case at bar, uniformity is of maximum significance.

The Court below itself recognizes that uniformity is lacking. It cites no case in this Honorable Court squarely deciding the issue raised. What is perhaps equally important is that in using the simple test for the application of the warranty of seaworthiness—namely whether the petitioner was doing work of a kind the crew was accustomed to perform—the Court below overlooked multifarious other considerations expressed in the *Sieracki* case, *supra*, and other authorities, as the basis for the application of the warranty of seaworthiness.

The Court below ignored the fact of modern specialization of labor and the fact that all shipboard workers risk the same hazards of shipboard service and the fact that all shipboard workers come aboard to perform services at the owner's request and for his benefit and disregarded considerations of social and economic concern which dictate that the risk of harm from unseaworthiness should fall on the shipowner rather than on one injured by unseaworthiness.

Not only does the decision below probably conflict with the decision of this Honorable Court in the *Sieracki* case, *supra*, it also probably conflicts with the decision of this Court, in the *Hawn* case, *supra*, wherein the warranty of seaworthiness was extended to a carpenter, albeit a carpenter doing work in aid of a cargo operation.

The decision below is believed to be in direct conflict with *Read* v. *U. S.*, *supra*, with which the Court below expressly disagreed (R. 12a, p. 15, *infra*).

In the *Read* case, *supra*, the Court of Appeals for the 3rd Circuit held that the warranty extended to a business guest—a repairman—engaged in work consisting of transforming a Liberty type merchant vessel into a troop-carrying transport.

The conflict between the *Read* case and the case at bar is irreconcilable and should be resolved by this Honorable Court.

Decisions in other Circuit and District Courts are also inconsistent with the result herein.

In the case of *Ross* v. *Zealand*, 143 Fed. Supp. 656, a port watchman was held entitled to the warranty of seaworthiness. The decision was affirmed by the Court of Appeals for the Fourth Circuit in 240 Fed. (2) 820 (1957).

Also, in the case of *Imperial Oil Ltd.* v. *Drlik*, 234 Fed. (2) 4, decided by the Court of Appeals for the 6th Circuit in 1956, cert. den. 352 U. S. 941, there is clear dictum that the warranty applies to an employee of a shipbuilding company engaged in repairs and related work.

In *Caudill* v. *Victory Carriers*, 149 Fed. Supp. 11, the Court said at page 15: "The gradual expansion of the doctrine pronounced in Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 AMC 698, wherein the Court held that the shipowner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work aboard even though employed by an independent stevedoring contractor whom the owner hired to load or unload the ship, is apparent. Petterson, supra, is a typical example. Ross v. SS. Zealand, 4 Cir. 240 Fed. 2nd 820, affords similar protection to a watchman employed by a Port Service. Carpenters, employed by independent contractors, fall within the same classification as to employment activities aboard ship. *The day may come, if it has not already arrived, when the doctrine of seaworthiness will be extended to all business invitees aboard ship, for Sieracki holds that liability arises as an incident of performing the ship's service with the owner's consent.*" (Italics added.)

Again, in *Meyers* v. *Pittsburg S. S. Co.*, 165 Fed. (2) 642 (6th Cir.) decided in 1948, a drydock worker assigned to a vessel in drydock for reconditioning and repair was injured and sought recovery on the ground of unseaworthiness. The Court found none. However, it said at page 644: "Were we to apply the reasoning of the Sieracki case, it would perhaps be not too difficult to conclude that a drydock company employee engaged in the repair of a ship on navigable waters, with the consent of the ship's

owner, is like the stevedore entitled to all the rights that the maritime law accords a seaman, and historical maritime practice might well disclose that such work was traditionally performed in large measure by seamen."

Again, we refer to the case of *Lester* v. *U. S. A.*, 127 Fed. Supp. 413, 234 Fed. (2) 625 (2nd Cir.—1956), wherein certiorari was granted 352 U. S. 889, and the case thereafter settled (352 U. S. 983).

The case involved an injury to an electrician who, according to the opinion of the Court of Appeals for the 2nd Circuit, was working on a vessel high and dry in a drydock, undergoing a general overhaul.

The Court observed at page 628: "*Although the doctrine of seaworthiness has been extended in recent years to shorebased employees such as libelant, who are injured while working on board a vessel in port,* the measure of liability remains the same as that to seamen at sea: whether the vessel was reasonably fit for the purpose for which she was being used." (Italics added.)

The conflict within the Second Circuit itself, apparent from the decisions in the case at bar and in the *Halecki* case, *supra*, is made all the more apparent by the *Lester* case, *supra*.

Apart from the foregoing judicial authorities, we point out that there is also the opinion of text writers to support the position that the *Hawn* case, *supra*, extends the warranty of seaworthiness to all workers who are exposed to ship-board hazards. See "The Law of Admiralty" Black and Gilmore, published 1957—page 364.

Last, it is submitted that there is much factual and historical data and literature to establish that seamen historically were accustomed to perform repair work comparable with the work of the petitioner herein, assuming

that such consideration is the sole consideration in determining whether the warranty of seaworthiness may be invoked.

No controlling authority has been found which analyzes this factual and historical factor or discusses its relationship to the major question of the extent of the class of business invitees aboard vessels entitled to a warranty of seaworthiness.

## Conclusion

A matter of substantial importance, governed by federal law is presented herein.

On the basis of the authorities above set forth, the decision of the Court below appears to be in conflict, not only with other decisions in the same Court, but in conflict with decisions of other District Courts and Courts of Appeal for other Circuits and most important, with decisions of this Honorable Court.

**Wherefore, petitioner respectfully prays that this petition for a Writ of Certiorari should be granted.**

Respectfully submitted,

GUNNLEIK BERGE, *Petitioner*

By: FRANK REISS, *Attorney*

Dated, New York, New York,
March, 1958.

JACK STEINMAN,
HARRY H. LIPSIG,
*on Petition.*